**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL APPEAL No. 1535 of 2003**
**With**
**CRIMINAL APPEAL No. 290 of 2004**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE M.S.SHAH**
and
**HONOURABLE MR.JUSTICE D.H.WAGHELA**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**MANOJ @ LATIF SHRILAL - Appellant(s)**
**Versus**
**STATE OF GUJARAT - Opponent(s)**

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**Appearance :**
MR PARESH UPADHYAY with MR VAIBHAV A VYAS for Appellant(s) : 1,
MR RC KODEKAR APP for Opponent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE M.S.SHAH**
**and**
**HONOURABLE MR.JUSTICE D.H.WAGHELA**

**Date : 25/10/2005**

**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE M.S.SHAH)**

Both these appeals are directed against the judgment and order dated 16.10.2003 passed by the learned Principal Judge, City Sessions Court, Ahmedabad in Sessions Case Nos.80 and 81 of 2002 convicting the appellants for the offence punishable under 302 read with Section 34 IPC and sentencing them to life imprisonment and also sentencing them to pay fine of Rs.5,000/- each in default rigorous imprisonment for three months.

2. The prosecution case, briefly stated, is that on 24.10.2001 at about 11.00 PM the appellants herein (hereinafter referred to as accused Nos.1 and 2) and four other accused (accused Nos.3 to 6) were moving from Nehrunagar Cross Roads after watching garbas. At that time the accused were teasing and gesticulating before Chetnaben wife of deceased Narendrabhai Patel. Hence, the complainant (cousin brother of the deceased) and the deceased had scolded the accused for teasing Chetnaben. Thereupon all the six accused abused the deceased and assaulted the deceased and thereby committed the offence punishable under Sections 504, 352 and 114 IPC. The accused were further

charged with the common intention of causing the death of deceased Narendrabhai. All the accused had surrounded the deceased and accused No.1 snatched the knife from the waistband of accused No.2 and inflicted a blow on the left thigh near the private part of the deceased. Since the people in the vicinity gathered together, the accused ran away after leaving the car on the spot. In the course of the treatment, the deceased succumbed to the injuries. The accused were, therefore, charged with the offence punishable under Section 302 read with Section 114 and 34 IPC. Accused Nos.1 and 2 were also charged with the offence punishable under Section 135(1) of the Bombay Police Act, 1951 for using and carrying a knife in violation of the notification under the Bombay Police Act, 1951. Accused No.1 was also charged with the offence punishable under Sections 141 and 142 of the Bombay Police Act for entering the city of Ahmedabad in violation of the externment orders dated 14.3.2001.

3. The accused pleaded not guilty and they were all tried by the City Sessions Court at Ahmedabad. Since accused No.6 had absconded, he was tried separately in Sessions Case No.81 of 2002 and accused Nos.1 to 5 were tried in Sessions

Case No.80 of 2002.

4, The prosecution led the following evidence :-

PW 1 Complainant Rakeshbhai Ghanshyambhai Patel, Exh.15, cousin brother of the deceased who was also travelling along with the deceased on a separate scooter.

PW 20 Chetnaben Narendrabhai Patel, Exh.70, wife of the deceased, who was also accompanying the deceased on the same scooter.

PW 17 Asmiben Rakeshbhai Patel Exh.63 wife of the complainant who was also travelling along with the complainant on the same scooter.

PW 19 Dr Rohit Chimanlal Jariwala, Exh.67, Assistant Professor of Forensic Medicine at the VS Hospital who performed the post-mortem and submitted the report Exh.68.

The prosecution also examined PW 22 Ashokbhai Ishwarbhai Patel Exh.74, Circle Inspector who prepared the map of the scene of offence, the panch witness, and also the panch witnesses for the panchnama for the scene of offence and arrest panchnama were examined. The Investigating Officer and the police witnesses were also examined.

5. After considering the oral and documentary evidence on record, the learned Sessions Judge gave the finding that while the involvement of accused Nos. 5 and 6 was not proved beyond reasonable doubt, the presence of accused Nos.1 to 4 was proved beyond reasonable doubt, but the evidence on record did not implicate accused Nos.3 and 4 for the offence in question. In view of the teasing and gesticulating the deceased asked complainant Rakeshbhai to stop their scooters and to wait for the accused coming in the Fiat car and they made the Fiat car stop and scolded the accused for teasing the wife of the deceased. The learned Sessions Judge came to the conclusion that after that altercation, accused No.1 snatched the knife from the waistband of accused No.2 and inflicted forcefully a knife blow on the thigh of the deceased near his private part, which resulted into rupture of femoral artery and, therefore, accused No.1 had intended to cause the injury which was sufficient in the ordinary course of nature to result into death and, therefore, accused No.1 was guilty of the offence punishable under Section 302 IPC. The learned Sessions Judge also held that since accused No.2 was carrying a knife with him and allowed accused No.1 to use the knife for inflicting such injury which was

sufficient in the ordinary course of nature to result into death of the deceased, accused No.2 was also guilty of the offence punishable under Section 302 read with Section 34 IPC. Accordingly, both the accused came to be sentenced to suffer life imprisonment. It is against the aforesaid judgment that two separate appeals are filed by accused Nos.1 and 2.

6. Mr Paresh Upadhyay, learned counsel for the appellants has made the following submissions :-

(i) Even as per the prosecution case, the incident took place when the deceased and the complainant with their family members were returning from their native place at about 11.00 PM on 24.10.2001 and the accused were returning after watching garbas during Navratri festival. The deceased and the accused had never known each other previously. According to the prosecution case, the incident occurred on account of teasing of the wife of the deceased which led to the altercation and the sudden fight. Hence there was no question of premeditation on the part of the

accused. Only one knife blow was given by accused No.1 and that too on a non-vital part of the body of the deceased and, therefore, the accused had not acted in a cruel manner. After inflicting one blow on the deceased, the accused ran away and there was no question of the accused having taken any undue advantage or acted in a cruel or unusual manner. Hence all the ingredients of Exception 4 to Section 300 were satisfied and the case clearly went out of Section 300.

(ii) At the most, the case would fall under Section 304 Part II because the accused had no intention of causing the death or causing any injury which would be sufficient in the ordinary course of nature to result into death. The knife blow was not given on any vital part of the body like head, chest or abdomen. Even according to the medical evidence, a non-medical person would not have known that the knife blow on the part between private part and the thigh of a person would result into rupture of the femoral artery and, therefore, even if the knife blow was intended to

be given by accused No.1 on that part of the body where it landed, the accused did not have any intention or even knowledge as contemplated by Section 304 Part I or 304 Part II.

Reliance is placed on the following decisions:-

(i) 1986 GLH 715

(ii) AIR 1983 SC 463

(iii) 1981 GLH 500

(iv) AIR 1968 SC 867

(v) 1994 Cr.LJ 3019

(vi) AIR 1995 SC 2452

(vii) 1993 (1) GLH 382 (SC)

(viii) AIR 1981 SC 1441

(ix) AIR 1996 SC 3513

7. On the other hand, Mr Kodekar, learned APP has submitted that the accused were travelling in the Fiat car and following the deceased and his wife for the purpose of teasing and when the deceased scolded them for doing so, the accused came out of the car and accused No.1 inflicted the knife blow on a vital part of the body of the deceased. Hence, the case did fall under Section 300 clause

thirdly and that the learned Sessions Judge rightly convicted both the accused for the offence punishable under Section 302 read with Section 34.

8. Having heard the learned counsel for the parties, we find considerable force in the submission made on behalf of the accused that even as per the prosecution case, the act of accused No.1 inflicting the knife blow on the body of the deceased was not a premeditated one. It appears from the map of the scene of the offence Exh.76 (Page 649) that the distance between Nehrunagar circle from where the accused are stated to have started teasing the wife of the deceased and the place of the incident was only 500 mts. as per the deposition of PW 22 Ashokbhai Ishwarbhai Patel at Exh.74. Hence, even going by the prosecution case, the accused were moving in the Fiat car and the deceased and his wife had travelled the said distance on the scooter and, therefore, very short time must have elapsed during which the teasing took place or continued. Hence when the deceased asked the Fiat car driver to stop the vehicle and scolded the accused sitting in the car for teasing his wife, even as per the prosecution witnesses the altercation and the sudden assault by accused No.1 on the

deceased took place within a matter of a few minutes. It is, therefore, not possible to accept the prosecution plea that accused No.1 or any other accused had entertained any intention of causing the death of the deceased or of causing any injury, which would be sufficient in the ordinary course of nature to cause the death of the deceased. There is also no dispute about the fact that only one knife blow was given on the spot between the private part and thigh of the deceased and the accused had thereafter run away. The accused had also not inflicted any knife blow nor had they launched any assault on any other prosecution witnesses who were accompanying the deceased. Therefore, the accused cannot be said to have taken undue advantage or having acted in a cruel or unusual manner. It is true that from the evidence on record it transpires that the accused had indulged into the teasing of the wife of the deceased, but as per the Explanation to Exception 4, it is immaterial in such cases which party offers the provocation or commits the first assault and, therefore, the act committed by accused No.1 in a sudden fight in the heat of passion upon a sudden quarrel without premeditation fell under Exception 4 to Section 300.

9. The next question is as to which offence is committed by accused No.1. Although initially the learned counsel for the appellants sought to contend that even accused No.1 could not be guilty of any offence other than Section 324 or 326, in view of the law laid down in several decisions of this Court and the Apex Court, and particularly the decision of this Court in **Jabbar Suleman Dhoka vs. State of Gujarat, 1986 GLH 715,** the learned counsel for the appellants submitted that the only offence committed by accused No.1 fell under Part II of Section 304 IPC.

10. On the other hand, the learned APP submitted that accused No.1 did have the intention of causing such a serious injury on the deceased that the case would fall under Part I of Section 304 IPC.

11. Having heard the learned counsel for the parties at length and having gone through the evidence on record including the medical evidence of PW 19 Dr Rohit Chimanlal Jariwala Ex.67 clearly stating that the deceased had sustained an external injury 4 cms. X 2 cms. on the left thigh which cut through the skin subcutaneous tissue, the muscles in front of the femur bone and the left femoral

artery and that a person not knowing medical science would not know where the femoral artery is situate or its importance, we are of the view that accused No.1 cannot be said to have entertained any intention to cause an injury which would be sufficient in the ordinary course of nature to cause the death. As held by this Court in Jabbar Suleman Dhoka (supra), looking to the nature of the weapon used by the accused and considering the fact that the blow was given on the thigh of the deceased, it can at the most be said that the accused had knowledge that by his act death may be the result and, therefore, the case would fall under Section 304 Part II.

12. Coming to the question of sentence, as far as accused No.1 is concerned, Mr Upadhyay learned counsel for the appellants submitted that in a series of decisions where conviction is under Section 304 Part II, the usual sentence is for a period of five years.

On the other hand, Mr Kodekar, learned APP submitted that apart from the nature of the injury resulting into the death of the deceased, the previous conduct of the accused is also a relevant factor while deciding the quantum of

sentence and that since accused No.1 and his associates are shown to have indulged into teasing the wife of the deceased, which naturally provoked the deceased into scolding the accused, instead of being apologetic for their conduct, the accused and particularly accused No.1 had gone to the extent of inflicting fatal knife injury on the deceased and, therefore, the maximum sentence of ten years should be imposed on accused No.1.

13. Though a reference was made to the charge of accused No.1 having violated the externment order passed under the Bombay Police Act, since no such notification was produced on the record of the proceedings, the learned trial Judge did not record any conviction of accused No.1 for the offence punishable under the Bombay Police Act. However, taking an overall view of all the relevant facts and circumstances of the case including the previous conduct of accused No.1 which resulted into the altercation, we are of the view that the interest of justice would be served if accused No.1 is sentenced to suffer rigorous imprisonment for a period of seven years and to pay fine of Rs.5,000/- already imposed by the learned trial Judge.

14. Coming to the case of accused No.2, while the acts or omission on his part may be morally reprehensible, we are unable to confirm the view of the learned trial Judge that accused No.2 was guilty of any offence punishable under Section 302 or even 304 Part II read with Section 34. It is true that if carrying a knife was in violation of the provisions of the Bombay Police Act, 1951, accused No.2 could have been convicted for the said offence but even as per the prosecution case, accused No.2 had not given or offered the knife lying with him, but it was accused No.1 who snatched the knife from the waistband of accused No.2. In the above view of the matter also in view of our finding that the act committed by accused No.1 was not a premeditated one and that even the assault on the deceased by the accused was not a premeditated one, it is not possible to convict accused No.2 for any offence of culpable homicide with the aid of Section 34 or Section 114 IPC or any other provision of IPC fastening vicarious liability on the accused. Even so, in the background of the facts narrated hereinabove and in absence of any explanation as to why accused No.2 was carrying a knife of 16.5 cms. Length and 2.8. cms of width and the fact that accused No.2 did not himself use the knife but went out of

the car along with accused No.1 for assaulting the deceased, it appears to us that accused No.2 was guilty of the offence punishable under Section 326 read with Section 34 IPC as infliction of the knife blow on the deceased was likely to put in danger life of the deceased.

15. Coming to the question of sentence for accused No.2 since accused No.2 is held to be only vicariously liable even for the offence punishable under Section 326 and since the said accused has already undergone the sentence for 3 years and 11 months and is on the verge of completing four year of imprisonment within a week, we are of the view that interest of justice would be served if accused No.2 is sentenced to suffer imprisonment already undergone.

16. In view of the above discussion, both the appeals are partly allowed. The conviction of accused No.1 – Nimesh alias Gattu Nandlal for the offence punishable under Section 302 read with Section 34 IPC is altered to conviction for the offence punishable under Section 304 Part II IPC. Accused No.1 is sentenced to suffer imprisonment for a period of 7(seven) years and to pay fine of Rs.5,000/- (Rupees five thousand), in default simple

imprisonment for one year.

The conviction of original accused No.2 – Manoj alias Latif Shrilal for the offence punishable under Section 302 read with Section 34 IPC is altered to conviction under Section 326 read with Section 34 IPC. Accused No.2 is sentenced to suffer the period of imprisonment already undergone by him. Accused No.2 Manoj alias Latif Shrilal is, therefore, ordered to be set free immediately unless required in any other case for any other offence.

(M.S. SHAH, J.)

(D.H. WAGHELA, J.)

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